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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)**

BOBBY S. DUTTA,

Plaintiff and Appellant,

v.

CANDICE COKER,

Defendant and Respondent.

C056023

(Super. Ct. No. 04AS02804)

In this personal injury case resulting from a minor auto accident, a jury found in favor of defendant and respondent Candice Coker and against plaintiff and appellant Bobby S. Dutta. Following the verdict, the trial court awarded Coker costs of suit, including approximately \$50,000 in expert witness fees pursuant to Code of Civil Procedure section 998.¹

¹ Undesignated statutory references are to the Code of Civil Procedure.

Dutta appeals from the postjudgment order allowing Coker to recover the vast majority of her witness fees pursuant to section 998.² He claims the trial court failed properly to exercise its discretion and that the offer was unreasonable at the time it was made. We conclude the court did not abuse its discretion and shall affirm the postjudgment order.

FACTUAL BACKGROUND

On January 12, 2004, Dutta was riding as a passenger in a 2003 Lexus RX 300 which had come to a stop at a traffic light. Coker, following behind, came to a stop about three to five feet behind Dutta's vehicle. When the traffic light turned green Coker saw Dutta's vehicle move forward, so she pressed the accelerator of her 1996 Chevy Blazer and "gave it a little bit of gas," rolling her vehicle forward. Coker then glanced away for a moment. By the time she looked back, Dutta's vehicle had come to a complete stop. Coker applied the brakes but could not avoid bumping the back of Dutta's vehicle. Coker's expert estimated that she was traveling no more than six to eight miles per hour when her Chevy Blazer came into contact with Dutta's vehicle.

Prior to this incident, Dutta had an extensive history of being involved in rear-end traffic collisions and had symptoms of back and neck pain, as well as leg cramps from the prior

² Dutta also appealed from the judgment itself. However, in his opening brief, he has foresworn any challenge to the jury verdict in favor of his adversary.

accidents. Dutta also had lower back surgery in July 2002 as a result of a rear-end accident in April 2000.

Dutta testified that his neck "stiffened up" the night of the accident. He then underwent a course of physical therapy for a cervical strain. The treatment continued for approximately a month, ending in March 2004. By the time therapy ended, the cervical strain injury had resolved. However, Dutta testified, symptoms of leg cramping, which he had experienced after his back surgery in 2002, reappeared three or four days after the 2004 accident. At trial, Dutta claimed to have incurred approximately \$34,000 in charges for medical care and treatment since the accident.

PROCEDURAL HISTORY

On July 12, 2004, Dutta filed suit against Coker for damages suffered as a result of the accident. On October 20, 2004, Coker made an offer to settle the case for \$1,501 pursuant to section 998. At the time of the offer, Dutta's medical expenses for the cervical injury were \$1,569.

The case was submitted to nonbinding judicial arbitration. The arbitrator ruled in favor of Dutta and awarded him \$60,113.47.³ Coker rejected the arbitration award and the case was tried de novo before a jury.

³ The arbitrator awarded Dutta \$17,113.47 in medical expenses and \$43,000 for pain and suffering.

At the trial Coker's expert, Dr. Laura Liptai, a biomedical and mechanical engineer, testified that the G-force caused by the impact was "very, very low" and disagreed with the opinion of Dutta's expert that the cervical strain was caused by the accident.

The jury returned a special verdict in favor of Coker, finding that she was negligent and Dutta incurred damages, but that her negligence was not a substantial factor in causing Dutta's injuries.

After Dutta's motion for a new trial was denied, Coker submitted a memorandum of costs, seeking a total of \$61,266.48. Of this amount, Coker sought expert witness fees of \$52,268.14 under section 998.

Dutta filed a motion to tax costs, contending that Coker should not be permitted to recover special fees, because the section 998 offer of \$1,501 was unreasonable at the time it was made. The trial court taxed as "excessive," witness fees in the amount of \$2,444.50, but permitted Coker to recover the remainder.

In articulating his ruling, Judge Connelly noted that the accident "was a very, very low-impact [collision]." The judge added that, although he would have found some causal link between the accident and Dutta's injuries, the jury did not. Moreover, given the difficulty of proving causation, the court could not conclude that an offer of \$1,501 was in "bad faith."

Consequently, the offer did not violate the reasonable and good faith requirements implied in section 998.

DISCUSSION

Dutta contends the trial court abused its discretion when it denied his motion to tax costs. He argues that the trial court failed to determine whether the offer was in good faith from *his* perspective and that the offer was unreasonable in light of the facts known to the parties at the time.

Section 998 sets forth a procedure under which a party in a civil lawsuit may make a pretrial offer to settle the action. If the offer is not accepted and the offeror obtains a judgment at least as favorable as that proposed in the offer, the offeror may recover certain costs and expert witness fees. (*Elrod v. Oregon Cummins Diesel, Inc.* (1987) 195 Cal.App.3d 692, 695-696 (*Elrod*).) "Because the Legislature has made an award of costs under section 998 discretionary, appellate decisions have held that trial courts may properly consider whether the subject offer was made in good faith and was reasonable under the existing circumstances." (*Barba v. Perez* (2008) 166 Cal.App.4th 444, 451; see *Wear v. Calderon* (1981) 121 Cal.App.3d 818, 821.)

Whether the settlement offer was reasonable and made in good faith is left to the sound discretion of the trial court. (*Elrod, supra*, 195 Cal.App.3d at p. 700.) On appeal, the losing party has the burden of establishing the trial court abused its discretion. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 331.) An abuse of discretion occurs when the court "exercises discretion

in an arbitrary, capricious or patently absurd manner resulting in a manifest miscarriage of justice.” (*People v. Shaw* (1998) 64 Cal.App.4th 492, 496.)

In this case, the trial court found that Coker’s settlement offer of \$1,501 was in good faith and reasonable under the circumstances. This determination was not arbitrary or irrational, in light of the following facts: Coker’s offer was made three months after the action was filed, and at a time when Dutta’s cervical spine strain had resolved. The accident was a low-impact collision, causing minimal damage to both vehicles.⁴ The offer was within the range of Dutta’s total medical expenses at the time. Finally, because Dutta already had back surgery and a number of preexisting injuries and symptoms from prior accidents, proof of causation posed a significant hurdle.

Dutta claims the trial court’s ruling is inconsistent with this court’s holding in *Elrod*. In *Elrod*, we laid out a two-prong test to determine the reasonableness of a section 998 offer: first, whether the offer represented a reasonable prediction of what defendant would have to pay plaintiff following trial premised upon information that was known or reasonably should have been known to the defendant (*Elrod*,

⁴ Coker’s Chevy Blazer was approximately three to five feet away and traveling at a speed no greater than six to eight miles per hour when it bumped the back of Dutta’s vehicle. The total damage to Coker’s Blazer was limited to the cost of replacing the license plate holder. The damage to Dutta’s vehicle was described as a “crease” on the rear bumper.

supra, 195 Cal.App.3d at p. 699); and, second, "whether defendant's information was known or reasonably should have been known to plaintiff" (*ibid.*).

Dutta insists that the trial court failed to apply the test correctly because it did not consider whether the offer was realistic from *his* perspective. However, the second prong of *Elrod* does not mandate a one-sided evaluation of the offer from plaintiff's perspective, but merely requires consideration of whether the plaintiff had access to all the information *known to the defendant* when the offer was made. (*Elrod, supra*, 195 Cal.App.3d at pp. 699-700.) The standard is an *objective* one, based on what was known or reasonably should have been known by both parties. (*Id.* at p. 700.)

In *Elrod*, we upheld the trial court's determination that a defendant's settlement offer was not reasonable, where the defendant possessed crucial information limiting its exposure that was unknown and not reasonably available to the plaintiff. (*Elrod, supra*, 195 Cal.App.3d at pp. 700-702.) This situation does not compare to *Elrod* because Coker's offer was based on information that was equally known or available to both sides. (*Id.* at pp. 699-701.) In light of the nature of the accident and the dubious issue of causation, *both parties* knew or should have known that the risk of a small recovery or defense verdict was significant. The trial court's ruling was entirely consistent with *Elrod*.

Dutta also argues that the offer was not reasonable since he was an "eggshell plaintiff," who could not have anticipated that he would incur thousands of dollars in additional medical charges. However, given the minor nature of the accident, the fact that Dutta's neck strain had resolved and that he had a long history of preexisting injuries and symptoms, the risk of a defense verdict was present regardless of what Dutta's final medical bill turned out to be. Thus, Coker's offer was a realistic evaluation of her liability when it was made.

When a party obtains a judgment more favorable than its pretrial offer, it is presumed to have been reasonable and the opposing party bears the burden to show otherwise. (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 134.) Since Coker ultimately prevailed at trial, the judgment was prima facie evidence that her offer was reasonable and the burden shifted to Dutta to prove otherwise. Given the circumstances we have recounted, the trial court did not abuse its discretion in deeming the offer a good faith and reasonable one at the time.

Dutta finally asserts that a serious injustice would result if he were required to pay more than \$50,000 in fees under the circumstances of this case. However, the Legislature has made its own justice calculus, to which we must adhere.

The essential function of section 998 is to "encourage settlement by providing a strong financial disincentive to a party--whether it be a plaintiff or a defendant--who fails to achieve a better result than that party could have achieved by

accepting his or her opponent's settlement offer." (*Bank of San Pedro v. Superior Court* (1992) 3 Cal.4th 797, 804.) Thus, "[w]hen a defendant perceives himself to be fault free [sic] and has concluded that he has a very significant likelihood of prevailing at trial, it is consistent with the legislative purpose of section 998 for the defendant to make a modest settlement offer. If the offer is refused, it is also consistent with the legislative intent for the defendant to engage the services of experts to assist him in establishing that he is not liable to the plaintiff. It is also consistent with the legislative purpose under such circumstances to require the plaintiff to reimburse the defendant for the costs thus incurred. It is clear that the Legislature adopted the statute to encourage early settlement of lawsuits to avoid the time delay and economic waste of trial, and to reduce the number of meritless lawsuits by requiring the losing party to pay the costs incurred by the prevailing party." (*Culbertson v. R.D. Werner Co., Inc.* (1987) 190 Cal.App.3d 704, 710-711.)

We conclude the legislative purpose of section 998 is not violated by requiring a plaintiff, who confronts serious causation problems and insists on going to trial, to bear the burden of defendant's expert witness fees if the verdict proves less favorable than the defendant's modest pretrial offer.

DISPOSITION

The postjudgment order awarding Coker costs pursuant to section 998 is affirmed. Coker is awarded her costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (2).)

_____, BUTZ, J.

We concur:

_____, NICHOLSON, Acting P. J.

_____, CANTIL-SAKAUYE, J.